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No. 08-61

In the Supreme Court of the United States

FLAMOR DJOKOVIC, PETITIONER

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in not providing additional explanation for its rejection of petitioner's contention that he was eligible for asylum under 8 C.F.R. 1208.13(b)(1)(iii)(B).

2. Whether the failure of the Board of Immigration Appeals to provide petitioner with the final corrected transcript of an immigration judge's oral decision violated the Due Process Clause under the circumstances of this case.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A23) is not published in the *Federal Reporter* but is reprinted in 273 Fed. Appx. 505. The decisions of the Board of Immigration Appeals (Pet. App. B1-B4) and the immigration judge (Pet. App. C1-C40) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 14, 2008. The petition for a writ of certiorari was filed on July 11, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides that the Secretary of

Homeland Security or the Attorney General may, in their discretion, grant asylum to an alien who demonstrates that he is a "refugee." 8 U.S.C. 1158(b)(1)(A). The INA defines a "refugee" as an alien who is unwilling or unable to return to his country of origin "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A).

An applicant for asylum bears the burden of demonstrating that he is eligible for that form of relief. 8 U.S.C. 1158(b)(1)(B)(i). Under the Attorney General's regulations, an alien who has demonstrated that he has suffered past persecution "shall also be presumed to have a well-founded fear of persecution." 8 C.F.R. 1208.13(b)(1). That presumption may be rebutted, however, if an immigration judge (IJ) makes certain specified findings. As pertinent here, the regulations provide that the presumption of a well-founded fear of future persecution that arises when an alien demonstrates that he has been subject to past persecution is rebutted if the government establishes by a preponderance of the evidence that "[t]here has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution in the applicant's country of nationality." 8 C.F.R. 1208.13(b)(1)(i)(A); see 8 C.F.R. 1208.13(b)(1)(ii).

The Attorney General's regulations also provide that there are limited circumstances in which an IJ may grant asylum where an alien has demonstrated past persecution but the government has succeeded in rebutting the presumption of a well-founded fear of future persecution that arises from that showing. Subject to certain exceptions not at issue here, the regulations state that

an IJ has "discretion" to grant asylum in those circumstances "if:

> (A) The applicant has demonstrated compelling reasons for being unwilling or unable to return to [his or her] country [of nationality] arising out of the severity of the past persecution; or
>
> (B) The applicant has established that there is a reasonable possibility that he or she may suffer other serious harm upon removal to that country.

8 C.F.R. 1208.13(b)(1)(iii)(A) and (B); see *In re A-T-*, 24 I. & N. Dec. 296, 298 (B.I.A. 2007).

2. Petitioner is a native of the former Federal Republic of Yugoslavia who entered the United States in 1999 without authorization or inspection. Pet. App. A1, A3-A4. On March 8, 2000, petitioner applied for asylum and withholding of removal. *Id.* at A4.

3. a. On April 19, 2000, the former Immigration and Naturalization Service initiated removal proceedings against petitioner. Pet App. C2. In proceedings before an IJ, petitioner admitted the factual allegations contained in the Notice to Appear and conceded removability, but he renewed his applications for asylum and withholding of removal and also sought protection under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85.

On August 30, 2005, the IJ issued an oral decision. Pet. App. C1-C40. Based on petitioner's concessions, the IJ concluded that petitioner's "removability ha[d] been established by the requisite clear and convincing evidence." *Id.* at C3. The IJ also determined that peti-

tioner was not eligible for asylum or withholding of removal, see *id.* at C17-37, or protection under the CAT, see *id.* at C37-C39.[1]

The IJ identified several reasons for denying petitioner's application for asylum. First, the IJ found that petitioner "[was] not credible." Pet. App. C19; see *id.* at C33. The IJ stated that petitioner's testimony "contain[ed] internal inconsistencies," *id.* at C19, that his testimony and his written application for asylum were "inconsistent" in "critical" respects, *id.* at C19-C20, and that the record reflected "an absolute lack of corroborating evidence of the type that this Court would reasonably expect," *id.* at C30.

Second, the IJ stated that "[e]ven if [she were to] find[] that [petitioner] was credible," Pet. App. C33, she would still deny petitioner's application for asylum on the ground that the treatment identified by petitioner did "not rise to the level of persecution" within the meaning of the INA, *id.* at C34. The IJ explained that petitioner had identified "one brief detention lasting anywhere from 4 to 5 hours to a maximum of one day * * * that possibly resulted in one beating [from] which [petitioner] did not have any resulting medical treatment." *Ibid.*

Third, the IJ stated that "[e]ven if [she were to] find that such a single incident of brief confinement and harassment * * * constitute[d] persecution," she would still deny asylum on the ground that "country conditions ha[d] changed in" respondent's former home in what was then Serbia-Montenegro. Pet. App. C34. The IJ explained that "many of the events" described by peti-

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[1] Petitioner does not renew his claims for withholding of removal or protection under the CAT before this Court.

tioner in support of his application for asylum had "occurred while [Slobodan] Milosevic was in power" and that a 2004 State Department Country Report indicated "that there were no political killings, * * * [and] no reports of politically motivated disappearances * * * [or] political prisoners." *Id.* at C34-C35.

Finally, the IJ stated that petitioner had not shown that he had "a well-founded fear of persecution based upon or arising out of the severity of past persecution or humanitarian reasons." Pet. App. C36. With respect to the latter, the IJ determined that the events recounted by petitioner, even if assumed to be true, "in no way rise to the level of the incidents that were" involved in *In re N-M-A-*, 22 I. & N. Dec. 312 (1998), where the Board of Immigration Appeals (BIA or Board) concluded "that a month-long detention and beatings * * * and the disappearance and likely death of the applicant's father did not rise to the level of severity of past persecution that would give rise to a granting of asylum for humanitarian reasons." Pet. App. C36-C37.

b. Petitioner filed an administrative appeal to the BIA, which "adopt[ed] and affirm[ed]" the IJ's decision. Pet. App. B1-B4. With respect to the IJ's adverse credibility determination, the Board stated that petitioner had failed to provide a "sufficient explanation" or a "persuasive argument" with respect to several of the inconsistencies identified by the IJ. *Id.* at B3. The BIA further stated that petitioner had "offered little substantive challenge" regarding the IJ's finding that the conduct petitioner had identified, "even if it took place, would [not] have risen to the level of persecution." *Id.* at B4. Finally, although it "recognize[d] that Serbia and Montenegro formally split from each other in 2006," the Board stated that petitioner "ha[d] also not sufficiently

countered the [IJ's] finding that conditions have changed in Serbia-Montenegro." *Id.* at B4 & n.1.

4. a. Petitioner sought judicial review of the BIA's decision. In his brief to the court of appeals, petitioner noted that the final Administrative Record (A.R.) with which he had been provided in connection with his petition for judicial review contained two written versions of the IJ's original oral decision, one of which was signed and contained handwritten changes and one of which was unsigned and contained no handwritten changes. Pet. C.A. Br. 14. Petitioner asserted that he had been "only provided the unsigned and unchanged Oral Decision in the proceedings before the BIA" and that "[t]he changes made to the signed Oral Decision are numerous and are significant." *Ibid.* Petitioner identified four specific differences: one involved the definition of "torture" under the CAT (*id.* at 15 (citing A.R. 62)), one changed the word "admissions" to "omissions" in the context of discussing the legal standards for making credibility determinations (*ibid.* (citing A.R. 64)), and two were contained in the section of the IJ's decision that set forth the basis for the IJ's first reason for denying asylum—that is, the conclusion that petitioner was not credible (*ibid.* (citing A.R. 67, 74)). Petitioner argued to the court of appeals that "[i]f the BIA based its decision on the signed and changed decision, then the parties were deprived of due process and the BIA violated its own regulations." *Id.* at 14. He also argued that the BIA and the IJ had erred in rejecting his application for asylum. *Id.* at 16-30.

b. The court of appeals denied the petition for review in a unanimous unpublished opinion. Pet. App. A1-A23. With respect to petitioner's due process claim, the court concluded that two of the handwritten changes identified

by petitioner were not significant because the first involved the correction of an "obvious" mistake and the second "made little difference in practice given the surrounding context and * * * the accompanying citation, which referenced the language contained in the corrected copy." *Id.* at A10. The court described the other two changes--which both involved correcting previous misquotations of petitioner's testimony—as "very troubl[ing]," and it stated that "[i]f the IJ had actually relied on the inaccurate quotations in making her adverse credibility f[i]ndings, this court would be very troubled." *Id.* at A11. The court stated, however, that "[]that does not seem to be the case." *Ibid.* With respect to one of the corrections, the court noted that "the IJ accurately quoted [petitioner's] testimony" on the same point at two other places in the original version of the decision. *Ibid.* With respect to the other, the court concluded that, even in the original written version of the decision, "one could easily glean the factual basis of and reasoning behind the IJ's adverse[] credibility finding on that matter." *Ibid.*

The court of appeals stated that it is generally "a bad practice for a judge to continue working on his opinion after the case has entered the appellate process." Pet. App. A12 (quoting *Mamedov* v. *Ashcroft*, 387 F.3d 918, 920 (7th Cir. 2004)). The court determined, however, that an alien who claims that he was deprived of due process in a removal proceeding "must show error *and* substantial prejudice," *id.* at A9 (citation omitted) (emphasis added), and that petitioner "ha[d] failed to explain how he was *prejudiced* by not having" a copy of the final signed transcript of the IJ's oral decision while his case was before the BIA, *id.* at A12. The court explained that "if the BIA relied on the uncorrected deci-

sion," then petitioner "was not prejudiced because he had the opportunity to point out any mistakes to the BIA." *Ibid.* "On the other hand, if the BIA relied on the corrected version of the judgment," the court stated that petitioner had likewise not demonstrated prejudice because: (i) his brief to the BIA "questioned only the underly[ing] reasoning of the IJ and did not refer to any of the particular mistakes [petitioner] now identifies in the uncorrected copy"; and (ii) none of "the changes to the judgment [was] substantive." *Ibid.* The court stated that although it "deplore[d] an administrative process that failed to provide the parties with corrected copies of the IJ's decision, it is clear that the outcome of the case * * * would have been no different" had corrected copies been provided. *Id.* at A13.

The court of appeals also rejected petitioner's claim that the BIA erred in denying his application for asylum. Pet. App. A14-A21. The court concluded that "[t]he [IJ's] finding that [petitioner] did not have a well-founded fear of persecution based on * * * changed country conditions * * * was * * * supported by substantial evidence," *id.* at A19, and it affirmed on that "narrow ground[]," *id.* at A15. As a result, the court deemed it unnecessary to review the IJ's "adverse credibility finding or her finding that the alleged events did not []rise to[] the level of persecution." *Ibid.* The court also concluded that the IJ had not abused her discretion "in denying [petitioner's] request for asylum on humanitarian grounds." *Id.* at A21.

ARGUMENT

Petitioner contends (Pet. 12-17) that the court of appeals erred in "fail[ing] to consider whether [he was] entitled to humanitarian asylum based not on the sever-

ity of the past persecution but because there is a reasonable possibility that he will suffer 'other serious harm'" if removed from the United States. Pet. 12 (quoting 8 C.F.R. 1208.13(b)(1)(iii)(B)). Petitioner also contends (Pet. 17-20) that if the BIA relied on the final signed transcript of the IJ's oral decision in deciding his appeal, the manner in which his case was resolved violated the Due Process Clause. Further review is not warranted. The court of appeals' decision is correct, and petitioner does not assert, and has not shown, that it conflicts with any decision of this Court or of another court of appeals.

1. Petitioner's contention that the court of appeals erred in failing to address separately in its unpublished decision whether he may be eligible for asylum under 8 C.F.R. 1208.13(b)(1)(iii)(B) is without merit and does not warrant further review.[2]

a. The court of appeals quoted both subsections of 8 C.F.R. 1208.13(b)(1)(iii) in its decision, see Pet. App. A20, and it stated that "we cannot hold that the IJ abused her discretion in denying [petitioner's] request for asylum on humanitarian grounds," *id.* at A21. Petitioner does not assert that that ultimate conclusion was erroneous.

b. Petitioner is correct that the court of appeals did not separately explain why it had concluded that the IJ had not abused her discretion in denying asylum under 8 C.F.R. 1208.13(b)(1)(iii)(B). But petitioner never articulated an argument that he should be granted asylum on

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[2] Petitioner errs in framing the issue as whether he is "entitled to" asylum. Pet. 12. Asylum is always a discretionary form of relief, see 8 U.S.C. 1158(b)(1)(A), and the specific regulation upon which petitioner relies provides that asylum "may be granted" on the specified grounds "in the exercise of the decision-maker's discretion." 8 C.F.R. 1208.13(b)(1)(iii).

the ground "that there [was] a reasonable possibility that he * * * may suffer other serious harm upon removal" (8 C.F.R. 1208.13(b)(1)(iii)(B)) that was in any way independent of his contention that he had a "well-founded fear of [future] persecution" (8 C.F.R. 1208.13(b)(1)). Instead, in his briefs to both the BIA (A.R. 21-22) and the court of appeals (Pet. C.A. Br. 29-30), petitioner simply cited 8 C.F.R. 1208.13(b)(1)(iii)(B), a United Nations Convention that discusses its origin, a Tenth Circuit decision that quotes the regulation, and a portion of this Court's decision in *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 440-441 (1987), that discussed the meaning of "well-founded fear," a phrase that does not appear in Section 1208.13(b)(1)(iii)(B) of the regulations. Because petitioner's arguments regarding the two issues were functionally identical, the court of appeals' earlier conclusion that the IJ had not erred in "finding that [petitioner] did not have a well-founded fear of [future] persecution" (Pet. App. A19) had thus effectively disposed of petitioner's claim for asylum under 8 C.F.R. 1208.13(b)(1)(iii)(B) as well.[3] It was therefore not inappropriate for the court of appeals, in the circumstances of this case and in the context of an unpublished opinion, to limit its separate additional discussion to 8 C.F.R. 1208.13(b)(1)(iii)(A), which, unlike Section

[3] See Pet. App. A19 (stating that petitioner "did not submit any individualized evidence that would tend to show that he would remain a target for persecution despite the[] changed country conditions"); see also *Souw* v. *Mukasey*, No. 06-72938, 2008 WL 3843506, at *6 (9th Cir. Aug. 19, 2008) (stating that "[t]he evidence of changed country conditions effectively rebutted the presumption that [petitioner] would suffer future persecution," and that the BIA had not "erred in determining that [an alien] was not eligible for asylum pursuant to [8 C.F.R.] 1208.13(b)(1)(iii)(B)").

1208.13(b)(1)(iii)(B), does not require an alien to demonstrate that he may suffer future harm upon removal.

c. Petitioner does not assert that the decision of the court of appeals in this case conflicts with the court of appeals decisions cited at pages 15 and 16 of the petition for a writ of certiorari. In any event, the circumstances of those cases were significantly different from those presented here. In *Mohammed* v. *Gonzales*, 400 F.3d 785, 789, 802-803 (2005) (see Pet. 15), the Ninth Circuit granted a petition for review and remanded with directions for the BIA to grant an alien's motion to reopen her removal proceedings based on its conclusion that the alien had received ineffective assistance of counsel in the initial removal proceedings. In the course of doing so, the court simply remarked that "[e]ven if the presumption of a well-founded fear of future persecution were rebuttable, [the alien] might still succeed in obtaining asylum on remand" under 8 C.F.R. 1208.13(b)(1)(iii)(A) or (B). *Mohammed*, 400 F.3d at 801.

In *Liti* v. *Gonzales*, 411 F.3d 631 (2004), the Sixth Circuit did not "remand" (Pet. 16) at all. Instead, it concluded that it lacked jurisdiction to consider an alien's claim that she was eligible for asylum under the then-recently promulgated 8 C.F.R. 1208.13(b)(1)(iii)(B) because that claim had not been presented to the BIA. *Liti*, 411 F.3d at 642. The court then stayed entry of its order dismissing the alien's petition for review in order "to allow the BIA the opportunity to reopen the case and consider the [aliens'] new claim." *Ibid.*[4]

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[4] Even if there were some conceivable tension between the Sixth Circuit's decision in *Liti* and its unpublished decision in this case, that tension would be a matter for that court to resolve. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957) (per curiam).

d. Further review is not warranted for two other reasons as well. A case-specific claim that a court of appeals failed, in an unpublished decision, to provide a full explanation for its rejection of one of an alien's numerous assignments of error does not merit an expenditure of this Court's certiorari resources. There is no requirement that a court of appeals expressly address every assertion of error when it affirms the decision under review. And, in any event, such a claim would have been more appropriately dealt with by way of a petition for rehearing.

In addition, it is extremely unlikely that petitioner would be found to be eligible for asylum under 8 C.F.R. 1208.13(b)(1)(iii)(B) in any event. In order for petitioner to be eligible for asylum under that provision, it would not be enough for the court of appeals to conclude "that there is a reasonable possibility that [petitioner] * * * may suffer other serious harm upon removal." 8 C.F.R. 1208.13(b)(1)(iii)(B). Rather, the court would *also* need to resolve in petitioner's favor two other antecedent issues that it did not resolve in its decision below (see Pet. App. A15): whether the IJ and the BIA erred in concluding that petitioner was not credible (see *id.* at B2-B4, C17-C33) and that the events petitioner recounted, even if deemed credible, would not establish that he suffered *past* persecution (see *id.* at B4, C33-C34).

2. Petitioner also renews his contention that "[i]f the BIA based its decision on the signed and changed [IJ] decision, then the parties were deprived of due process and the BIA violated its own regulations." Pet. 18. As the court of appeals correctly recognized (Pet. App. A9), however, petitioner could not obtain relief on such a claim without demonstrating that he was prejudiced by his failure to receive a copy of the final signed transcript

of the IJ's oral decision until after the BIA had resolved his appeal. Petitioner fails to challenge either the premise that he was required to establish prejudice or the court of appeals' conclusion that "it is clear that the outcome of [his] case * * * would have been no different" had he been provided with such a copy. *Id.* at A13. Instead, petitioner asserts that the court of appeals "exceeded the scope of its authority" in resolving the prejudice issue itself rather than remanding to the BIA. Pet. 20.

a. A remand would have been appropriate had there been any plausible claim that petitioner suffered prejudice as a result of his failure to receive a copy of the final signed transcript of the IJ's decision. But the court of appeals did not exceed the bounds of its authority in determining that a remand was unnecessary under the circumstances of this case. Petitioner did not even argue to the court of appeals that he had suffered any tangible prejudice, and the court of appeals determined that the IJ had not "actually relied on" any of the altered text identified by petitioner in reaching her decision. Pet. App. A11.[5] In addition, none of the differences between the two versions of the IJ's decision identified by petitioner is contained in the portion of the opinion that the court of appeals found dispositive—*i.e.*, the conclusion that, regardless of whether petitioner had established past persecution, conditions in his country of origin had changed to the point where he could no longer have a well-grounded fear of future persecution. *Id.* at A15-A19; see pp. 6-7, *supra* (describing changes).

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[5] In contrast, in *Mamedov* v. *Ashcroft*, 387 F.3d 918, 919 (2004) (see Pet. 19)—which the court of appeals cited in its opinion in this case, see Pet. App. A12—the Seventh Circuit concluded that an IJ had made a "substantive change" to the original transcript.

b. This Court's review is also unwarranted because there is no indication that there is a recurring problem with respect to providing aliens with accurate transcripts of oral IJ decisions, and the BIA has recently taken steps to further improve the process of doing so. The Attorney General's regulations provide that removal hearings "shall be recorded verbatim." 8 C.F.R. 1240.9. The regulations further provide that when an IJ's oral decision is appealed to the BIA, the IJ "shall review the transcript and approve the decision within 14 days of receipt, or within 7 days after the [IJ] returns to his or her duty station if the [IJ] was on leave or detailed to another location." 8 C.F.R. 1003.5(a). The same regulation provides that the Chairman of the BIA and the Chief Immigration Judge "shall determine the most effective and expeditious way to transcribe proceedings before the [IJ] and take such steps as necessary to reduce the time required to produce transcripts * * * and improve their quality." *Ibid.*

According to the Executive Office for Immigration Review (EOIR), IJs are directed to make only minor typographical or grammatical changes when reviewing the transcripts of their oral decisions. Cf. Pet. App. A13 (describing alterations identified by petitioner as "cosmetic changes fixing errors that [petitioner] did not deem significant enough to mention in his brief[]to the BIA"). This Office has been informed by EOIR that, in its experience, IJs rarely make any changes at all. As a result, and in order to reduce delays in processing time, EOIR further reports that the BIA's practice is to serve the initial transcript simultaneously on both the IJ and the parties and to set a briefing schedule at the time of that service. When the BIA receives the final signed transcript from the IJ, the Board reviews it to ensure

that any changes simply correct minor transcription or grammatical errors. If the BIA determines that the IJ has made substantive changes to the original transcript, the Board's general practice is to remand the case to the IJ with directions to issue a new decision and serve it on the parties. It is also the Board's practice to state in such remand orders that the decision returned to the Board was not the decision the parties were given an opportunity to appeal and to remind the IJ that any revisions to the transcript of a previously rendered oral decision should be limited to minor editing of the order. In contrast, when the Board determined that the IJ had made no changes or only minor changes, the Board's previous practice was to place the final signed copy of the IJ's decision in the administrative record and to make it available to the parties upon request.

According to EOIR, the process described above has saved thousands of hours of processing time in cases involving aliens who have been detained during their removal proceedings. The Board issues approximately 3500 decisions in such cases each year.[6] EOIR advises that, under the procedures described above, the BIA is able to process appeals in cases involving detained aliens more than three weeks faster than would be the case if it were to await the final signed version of the transcript before distributing it to the parties and issuing a briefing order.

In EOIR's judgment, the process described above proved successful in the vast majority of cases. EOIR also reports, however, that the Board has recently implemented a practice of uniformly providing the final

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[6] See Executive Office for Immigration Review, *FY 2007 Statistical Year Book* at X1 (Apr. 2008) <http://www.usdoj.gov/eoir/statspub/fy07syb.pdf>.

signed copy of the IJ's decision to the parties whenever the IJ makes any changes after reviewing the initial transcript, and that this change will be reflected in the *Board of Immigration Appeals Practice Manual.* The fact that the procedures that generated this particular case have already been changed provides an additional reason why further review is not warranted here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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